

**RIGHT TO KNOW ADVISORY COMMITTEE
LEGISLATIVE SUBCOMMITTEE**

DRAFT AGENDA

October 21, 2011

11:00 a.m.

Room 438, State House, Augusta

Convene

1. Welcome and Introductions
2. 11:00 a.m.
FOA requests and responses: Form (from LD 1465, overlaps with Bulk Records Subcommittee)
Discussion, recommendations
3. 11:30 a.m.
FOA requests and responses: Practical problems with FOA requests and responses
Comments from invited guests
Invited presenters: Sam Adolphsen (MHPC), Michael Doyle, Dr. Dwight Hines, Dana Lee, Peter Merrill (MaineHousing), Nathan Poore (Falmouth Town Manager).
Discussion, recommendations
4. 12:30 p.m.
FOA requests and responses: Timelines and fees (from LD 1465)
Discussion, recommendations
5. Review Subcommittee responsibilities
6. Scheduling future subcommittee meetings

Scheduled meetings:

~~Thursday, October 27, 2011, 1:00 p.m., Public Records Exceptions Subcommittee (cancelled)~~
Thursday, November 10, 2011, 1:00 p.m., Legislative Subcommittee
Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee
Thursday, December 8, 2011, 1:00 p.m., Right to Know Advisory Committee

Adjourn

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>Notice of Public Proceedings</p> <p>Sec. 2. 1 MRSA §406, as amended by PL 1987, c. 477, §4, is further amended to read:</p> <p>§ 406. Public notice</p> <p>Public notice shall must be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons. This notice shall must be given in ample time to allow public attendance not less than 3 days prior to the public proceeding and shall must be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned. In the event of an emergency meeting, local representatives of the media shall must be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding.</p>	<p>§406. Public notice</p> <p>Public notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons. This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned. In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding.</p>	<ul style="list-style-type: none"> ▪ One day notice of planning board's additional meeting sufficient under the circumstances¹ 	<p><i>Opposed; do not include</i></p>
<p>Form of Request and Response</p> <p>2-A. Form. <u>If a public record exists in electronic or magnetic form, the requester may request a copy of the public record in a paper, electronic, magnetic or other medium, specify the storage medium and request that the copy be provided by an electronic transfer by the Internet or other means.</u></p>			

¹ Crispin et al. v. Town of Scarborough et al., 1999 ME 112, 736 A.2d 241.

**Right to Know Advisory Committee: Legislative Subcommittee
Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access**

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p><u>A. An agency or official shall provide a copy of the public record in the requested medium if:</u></p> <p style="padding-left: 40px;"><u>(1) The agency or official has the technological ability to produce the public record in that medium or can obtain the assistance necessary to produce the public record at a reasonable cost; and</u></p> <p style="padding-left: 40px;"><u>(2) The requester agrees to pay the agency's or official's costs to purchase and install any additional necessary computer software or hardware to accommodate the request and to copy the public record in a requested medium.</u></p> <p><u>B. If an agency or official cannot provide a copy of a public record in a requested medium, the agency or official shall identify every medium in which the public record can be provided for inspection and copying, which must include a paper copy, and the requester must identify the medium that is acceptable to the requester.</u></p>			

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<i>Remedies for Violations</i>	<p>1 MRS § 409, sub-§ § 1 and 4:</p> <p>1. Records. If any body or agency or official who has custody or control of any public record refuses permission to inspect or copy or abstract a public record, this denial must be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. Any person aggrieved by denial may appeal, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals are privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.</p> <p>4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.</p>	<ul style="list-style-type: none"> • Failure of governmental body to respond to request for records in the time established by statute is deemed a denial of the request² • In its review, superior court is the forum of origin for a determination of both facts and law with respect to the alleged violation and does not function in an appellate capacity, and thus, procedures for taking additional evidence on judicial review are inapplicable (overruling <u>Marxsen v. Board of Directors</u>, 591 A.2d 867).³ 	

² Cook v. Lisbon School Committee, 682 A.2d 672 (ME 1996).

³ Underwood v. City of Presque Isle, 1998 ME 166, 715 A.2d 148.

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>Sec. 6. 1 MRSA §410, as repealed and replaced by PL 1987, c. 477, §6, is amended to read:</p> <p>§ 410. Violations; injunction</p> <p>For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture fine of not more than \$500 may be adjudged.</p> <p><u>The Superior Court may issue an injunction to enforce the provisions of this chapter against any agency or official. A motion for an injunction is privileged in respect to its assignment for hearing and trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.</u></p>	<p>§410. Violations</p> <p>For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than \$500 may be adjudged.</p>	<ul style="list-style-type: none"> Penalties for official actions taken in executive session in violation of FOA laws may only be sought by the Attorney General or AG's representative⁴ Only Attorney General or AG's representative may enforce FOA laws by seeking imposition of fine⁵ If a requesting party has undertaken successful appeal of denial, that party is entitled to costs⁶ 	<p><i>Opposed; do not include</i></p>
Public Access Officer			
<p>Sec. 1. 1 MRSA §402, sub-§1-B is enacted to read:</p> <p><u>1-B. Public access officer. "Public access officer" means the person fulfilling the duties as described in section 413.</u></p>			<p>Agreed to Ask Staff to Redraft. Amend to include requirement that governmental units (state agencies, counties, cities,</p>

⁴ Lewiston Daily Sun v. School Administrative District No. 43, 1999 ME 143, 738 A.2d 1239.

⁵ Scola v. Town of Sanford, 1987 ME 119, 695 A.2d 1194.

⁶ Cook v. Lisbon School Committee, 682 A.2d 672 (ME 1996).

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>Sec. 7, 1 MRSA §412, as amended by PL 2007, c. 576, §2, is further amended to read:</p> <p>§ 412. Public records and proceedings training for certain elected officials and public access officers</p> <p>1. Training required. Beginning July 1, 2008, an <u>beginning July 1, 2008,</u> an <u>an</u> elected official and a public access officer, subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official <u>or</u> officer shall complete the training not later than the 120th day after the date the elected official takes the oath of office to assume the person's duties as an elected official <u>or the person</u> is designated as a public access officer pursuant to section 413, subsection 1. For elected officials subject to this section serving in office on July 1, 2008, the training required by this section must be completed by November 1, 2008.</p> <p>2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official <u>or a public access officer</u> in less than 2 hours. At a minimum, the training must include instruction in:</p>	<p>§412 Public records and proceedings training for certain elected officials</p> <p>1. Training required. Beginning July 1, 2008, an elected official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official shall complete the training not later than the 120th day after the date the elected official takes the oath of office to assume the person's duties as an elected official. For elected officials subject to this section serving in office on July 1, 2008, the training required by this section must be completed by November 1, 2008.</p> <p>2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official in less than 2 hours. At a minimum, the training must include instruction in:</p>		<p>towns) designate a FOA contact person and require FOA training for that person; remove other provisions</p>

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>A. The general legal requirements of this chapter regarding public records and public proceedings;</p> <p>B. Procedures and requirements regarding complying with a request for a public record under this chapter; and</p> <p>C. Penalties and other consequences for failure to comply with this chapter.</p> <p>An elected official or public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.</p>	<p>A. The general legal requirements of this chapter regarding public records and public proceedings;</p> <p>B. Procedures and requirements regarding complying with a request for a public record under this chapter;</p> <p>C. Penalties and other consequences for failure to comply with this chapter.</p> <p>An elected official meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection</p>		
<p>3. Certification of completion. Upon completion of the training course required under subsection 1, the elected official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The elected official shall keep the record or file it with the public entity to which the official was elected. <u>A public access officer shall file the record with the</u></p>	<p>3. Certification of completion. Upon completion of the training course required under subsection 1, the elected official shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The elected official shall keep the record or file it with the public entity to which the official was elected.</p>		

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>agency or official that designated the public access officer.</p> <p>4. Application. This section applies to the following elected officials:</p> <p>A. The Governor;</p> <p>B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;</p> <p>C. Members of the Legislature elected after November 1, 2008;</p> <p>E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;</p> <p>F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;</p> <p>G. Officials of school units and school boards; and</p> <p>H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special</p>	<p>4. Application. This section applies to the following elected officials:</p> <p>A. The Governor;</p> <p>B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;</p> <p>C. Members of the Legislature elected after November 1, 2008;</p> <p>E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;</p> <p>F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;</p> <p>G. Officials of school units and school boards; and</p> <p>H. Officials of regional or other political subdivisions who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose</p>		

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.</p> <p>This section also applies to a public access officer designated pursuant to section 413, subsection 1.</p> <p>Sec. 8. 1 MRSA §413 is enacted to read:</p> <p><u>§ 413. Public access officer; responsibilities</u></p> <p><u>1. Designation; responsibility.</u> Every agency or official shall designate to an existing staff member the responsibility of serving as a public access officer to oversee responses to requests for public records under this chapter. The public access officer shall oversee the prompt response to a request to inspect or copy a public record.</p> <p><u>2. Training.</u> A public access officer shall complete a course of training on the requirements of this chapter relating to public records and proceedings as described in section 412.</p> <p><u>3. Purpose; schedule.</u> A public access officer or other person acting on behalf of an agency or official may not inquire into the purpose of a request. A public access officer may inquire as to the schedule or order of inspection or copying of a public record or a portion of a public</p>	<p>district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.</p>		

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>record under section 408.</p> <p><u>4. Uniform treatment.</u> A public access officer shall treat all requests for information under this chapter uniformly without regard to the requester's position or occupation, the person on whose behalf the request is made or the status of the requester as a member of the media.</p> <p><u>5. Comfort and facility.</u> The public access officer shall ensure that a person may inspect a public record in the offices of the agency or official in a manner that provides reasonable comfort and facility for the full exercise of the rights of the public under this chapter.</p> <p><u>6. Unavailability of public access officer.</u> The unavailability of a public access officer may not delay a response to a request.</p>			
<p>Public Access Ombudsman</p> <p>Sec. 9. Appropriations and allocations. The following appropriations and allocations are made.</p> <p>ATTORNEY GENERAL, DEPARTMENT OF THE</p> <p>Administration - Attorney General 0310</p> <p>Initiative: Provides funds for a part-time Assistant Attorney General position to act as the public access ombudsman and general operating expenses required to carry out the purposes of this Act.</p> <p>GENERAL FUND</p> <p>2011-12 2012-13</p>	<p>5 MRSA §200-I. PUBLIC ACCESS DIVISION; PUBLIC ACCESS OMBUDSMAN</p> <p>1. Public Access Division; Public Access Ombudsman. There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as "the ombudsman," to administer the division.</p>	<ul style="list-style-type: none"> • Statute enacted, but never implemented due to lack of funding for position 	<p>Agreed to recommend funding for full-time position</p>

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>POSITION-LEGISLATIVE COUNT 0.500 0.500</p> <p>Personal Services \$62,120 \$65,576</p> <p>All Other \$5,000 \$5,000</p> <p>Total <u>\$67,120</u> <u>\$70,576</u></p>	<p>2. Duties. The ombudsman shall:</p> <p>A. Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;</p> <p>B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;</p> <p>C. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;</p> <p>D. Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved; and</p> <p>E. Make recommendations concerning ways to improve public access to public records and proceedings.</p> <p>3. Assistance. The ombudsman may</p>		

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
	<p>request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.</p> <p>4. Confidentiality. The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.</p> <p>5. Report. The ombudsman shall submit a report not later than March 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:</p> <ul style="list-style-type: none"> A. The total number of inquiries and complaints received; B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials; C. The number of complaints received concerning respectively public records and public meetings. 		

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
	<p>D. The number of complaints received concerning respectively:</p> <p>(1) State agencies;</p> <p>(2) County agencies;</p> <p>(3) Regional agencies;</p> <p>(4) Municipal agencies;</p> <p>(5) School administrative units; and</p> <p>(6) Other public entities;</p> <p>E. The number of inquiries and complaints that were resolved;</p> <p>F. The total number of written advisory opinions issued and pending; and</p> <p>G. Recommendations concerning ways to improve public access to public records and proceedings.</p>		
Timelines for Compliance with Requests			
<p>Sec. 3. 1 MRSA §408, as amended by PL 2009, c. 240, §4, is further amended to read:</p> <p>§ 408. Public records available for public inspection and copying</p> <p>1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within</p>	<p>1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record</p>	<p>▪ When person requests information that falls within FOA laws' disclosure requirements, and governmental entity</p>	<i>Tabled</i>

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>a reasonable period of time after making a request to inspect or copy the public record the time limits established in section 408-A. An agency or official may request clarification concerning which public record or public records are being requested, but in any case the agency or official shall acknowledge receipt of the request within a reasonable period of time. A person may request by telephone that a copy of the public record be mailed or e-mailed to that person.</p>	<p>within a reasonable period of time after making a request to inspect or copy the public record. An agency or official may request clarification concerning which public record or public records are being requested, but in any case the agency or official shall acknowledge receipt of the request within a reasonable period of time.</p>	<p>knows that it has particular records containing that information, entity must at least inform requesting party that material is available and that the requesting party may come in and "inspect and copy" the information sought⁷</p>	
<p>2. Inspection, translation and copying scheduled. Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought, as long as the inspection, translation and copying occur within the time limits established in section 408-A. The agency or official may use a 3rd party to make a copy of an original public record, but a requester may not remove the original of a public record from the agency or official.</p>	<p>2. Inspection, translation and copying scheduled. Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought.</p>		
<p>3. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows.</p> <p>A. The agency or official may charge a reasonable fee to cover the cost of copying.</p>	<p>3. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows.</p> <p>A. The agency or official may charge a reasonable fee to cover the cost of copying.</p>		

⁷ Bangor Publishing Co. v. City of Bangor, 544 A.2d 733 (ME 1988).

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than \$10 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.</p> <p>C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.</p> <p>D. An agency or official may not charge for inspection.</p> <p>E. If the requester requests that the public record be mailed, the agency or official may charge a fee not greater than the actual cost of mailing the record.</p> <p>4. Estimate. The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than \$20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 5 applies and the estimate must be provided within 3 business days of the request.</p> <p>5. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if:</p>	<p>B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than \$10 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.</p> <p>C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.</p> <p>D. An agency or official may not charge for inspection.</p> <p>4. Estimate. The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than \$20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 5 applies.</p> <p>5. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if:</p>		

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>A. The estimated total cost exceeds \$100; or</p> <p>B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.</p> <p>6. Waivers. The agency or official may waive part or all of the total fee if:</p> <p>A. The requester is indigent; or</p> <p>B. Release of the public record requested is in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.</p>	<p>A. The estimated total cost exceeds \$100; or</p> <p>B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.</p> <p>6. Waivers. The agency or official may waive part or all of the total fee if:</p> <p>A. The requester is indigent; or</p> <p>B. Release of the public record requested is in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.</p>		
<p>Sec. 4. 1 MRSA §408-A is enacted to read:</p> <p><u>§ 408-A. Timelines</u></p> <p>1. <u>Availability; redaction; location; collection.</u> A public record must be made available immediately upon request unless time is required to redact the record so as to allow inspection and copying of only those portions of the record containing information that is a public record or to locate and collect a record that is not in active use or that is in storage.</p> <p>2. <u>Certification.</u> If a public record is not available immediately, a public access officer shall promptly certify that fact in writing to the</p>			

Right to Know Advisory Committee: Legislative Subcommittee Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>requester, provide an explanation for the delay and either provide an opportunity to inspect or copy the public record within 5 business days or mail or e-mail the public record within 5 business days.</p> <p>3. <u>Large or multiple requests.</u> <u>If a large public record is requested or multiple public records are requested and the public access officer or a person acting on behalf of the agency or official cannot in the exercise of due diligence produce the entire record or multiple records within 5 business days after the request, the public access officer shall provide the portion of the public record or public records when available. The requester may waive this requirement and request to see the public record or public records requested as a whole when available.</u></p> <p>4. <u>Estimate.</u> <u>If the cost to comply with a request to inspect or copy a public record is greater than \$100, an estimate must be provided within 3 business days of the request.</u></p> <p>5. <u>Failure to comply.</u> <u>Failure to comply with this section may be treated as a denial of a request and is subject to the enforcement provisions of this chapter.</u></p> <p>Sec. 5. 1 MRSA §408-B is enacted to read:</p> <p><u>§ 408-B. Inspection by requester</u></p> <p><u>1. Ten business days.</u> <u>A requester shall complete an inspection of a public record within 10 business days after the record is made available for inspection. If the inspection is not completed</u></p>			

**Right to Know Advisory Committee: Legislative Subcommittee
Comparison of Current Law and LD 1465, An Act to Amend the Laws Governing Freedom of Access**

LD 1465	Current Law	Interpretation of Current Law and Comments	Subcommittee Recommendation
<p>within the 10-business-day period, a public access officer or a person acting on behalf of the agency or official shall inform the requester that a written request for additional time may be filed with the agency or official that has custody of the public record.</p> <p><u>2. Additional periods.</u> An agency or official shall allow an additional 20 business days beyond the period in subsection 1 for a requester to review a public record if the requester filed a written request for additional time with the agency or official or its public access officer or a person acting on behalf of the agency or official. If the inspection is not completed upon the expiration of the additional 20 business days, the public access officer or person acting on behalf of the agency or official shall inform the requester that a 2nd written request for an additional 10 days may be filed with the agency or official that has custody of the public record.</p> <p><u>3. Interruption of inspection.</u> The time allowed for inspection of a public record may be interrupted if the agency or official needs to use the public record. If an agency or official invokes this subsection, the public access officer, no later than 5 business days after the agency or official takes the record back, shall inform the requester in writing the dates that the public record will be available for the inspection to resume. The time allowed for an inspection is tolled during the period in which the public record is being used by the agency or official.</p>			

Legislative Subcommittee

LD 1465's Public Access Officer Provision: Proposed draft language changes

Sec. 1. 1 MRSA §402, sub-§1-B is enacted to read:

1-B. Public access officer. "Public access officer" means the person designated pursuant to section 413, subsection 1.

Sec. 2. 1 MRSA §412, as amended by PL 2007, c. 576, §2, is further amended to read:

§ 412. Public records and proceedings training for certain elected officials and public access officers

1. Training required. ~~Beginning July 1, 2008, an~~An elected official ~~and a public access officer,~~ subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official ~~or officer~~ shall complete the training not later than the 120th day after the date the elected official takes the oath of office to assume the person's duties as an elected official ~~or the person is designated as a public access officer pursuant to section 413, subsection 1.~~ ~~For elected officials subject to this section serving in office on July 1, 2008, the training required by this section must be completed by November 1, 2008.~~

2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official ~~or a public access officer~~ in less than 2 hours. At a minimum, the training must include instruction in:

- A. The general legal requirements of this chapter regarding public records and public proceedings;
- B. Procedures and requirements regarding complying with a request for a public record under this chapter; and
- C. Penalties and other consequences for failure to comply with this chapter.

An elected official ~~or public access officer~~ meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

3. Certification of completion. Upon completion of the training course required under subsection 1, the elected official ~~or public access officer~~ shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The elected official shall keep the record or file it with the public entity to which the official was elected. A public access officer shall file the record with the agency or official that designated the public access officer.

4. Application. This section applies to the following elected officials:

Legislative Subcommittee

LD 1465's Public Access Officer Provision: Proposed draft language changes

- A. The Governor;
- B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;
- C. Members of the Legislature elected after November 1, 2008;
- E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;
- F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;
- G. Officials of school units and school boards; and
- H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

This section also applies to a public access officer designated pursuant to section 413, subsection 1.

Sec. 3. **1 MRSA §413** is enacted to read:

§ 413. Public access officer; responsibilities

1. Designation; responsibility. Each State agency, county and municipality shall designate an existing employee as its public access officer to serve as the contact person for that agency, county or municipality with regard to requests for public records under this chapter. *[add language about making name of contact available to public?? Need to mention that the contact person is not solely responsible for fulfilling request or that request has to be made to POA??]*

2. Training. A public access officer shall complete a course of training on the requirements of this chapter relating to public records and proceedings as described in section 412.

Legislative Subcommittee: 2011

1. Criminal History Record Information Act revision
2. LD 1465, An Act To Amend the Laws Governing Freedom of Access
3. Requests for public records: necessity of formalities (Chris Parr)
4. Governor's letter of 14 July 2011: Clarify the parameters of what really constitutes government business. (His example is grocery receipts for the Blaine House.)
5. Governor's letter of 14 July 2011: Address the abuse of FOA for political purposes: requests made simply to gum up the work of the office and keep the office from moving initiatives forward. He suggested looking at increasing the \$10/hour rate as well as ways to combat abuses.
6. Status of Maine Public Broadcasting Network records under the Freedom of Access laws (Mike Brown)
7. Request from the Maine Heritage Policy Center to Maine State Housing Authority for information about public employees;
8. Definition of "reasonable time" (Dwight Hines)
9. Application of FOA laws to volunteer fire departments (Dwight Hines)
10. Use of technology for the purpose of remote participation by members of public bodies
11. Drafting templates
12. Storage, management and retrieval of public officials' communications, especially email

G:\STUDIES 2011\Right to Know Advisory Committee\Legislative Subcommittee\responsibilities for 2011.doc (9/1/2011 8:55:00 AM))

FAQ suggested updates 10-21-11

GENERAL QUESTIONS

What is the Freedom of Access Act?

The Freedom of Access Act ("FOAA") is a state statute that is intended to open the government of Maine by guaranteeing access to the "public records" and "public proceedings" of state and local government bodies and agencies.

Are federal agencies covered by the Freedom of Access Act?

No. The Freedom of Access Act does not apply to federal agencies operating in Maine or to federal government records. A similar but different federal statute called the "Freedom of Information Act" applies to the federal government. This federal statute does not apply to state or local government bodies, agencies or officials.

You can find the text of the Freedom of Information Act, 5 U.S.C. § 551 et seq., at: <http://www.usdoj.gov/oip/foiastat.htm> or you can find more general information on the Freedom of Information Act at: http://answers.usa.gov/cgi-bin/gsaict.cfg/php/enduser/stdadp.php?p_faqid=5940.

Who enforces the Freedom of Access Act?

Any aggrieved person may appeal to any Superior Court in the state to seek relief for an alleged violation of the Freedom of Access Act. 1 M.R.S.A. § 409 (1). Superior Courts Directory: http://www.courts.state.me.us/maine_courts/superior/directory.shtml

Relief can be in the form of an injunction issued by the court that directs the government body, agency or official to comply with the law, such as by providing access to a public proceeding or by making public records available for inspection or copying.

In addition, the Office of the Attorney General or the District Attorneys may bring an enforcement action seeking penalties if the alleged violation is willful. 1 M.R.S.A. § 410.

What are the penalties for failure to comply with the Freedom of Access laws?

A state government agency or local government entity whose officer or employee commits a willful violation of the Freedom of Access laws commits a civil violation for which a forfeiture of not more than \$500 may be adjudged. 1 M.R.S.A. § 410. Under the current law, there are no criminal penalties for failure to comply with a request for public records. It is a Class D crime to intentionally remove, alter, or destroy documents belonging to a state office. 1 M.R.S.A. § 452.

FAQ suggested updates 10-21-11

Are elected officials required to take training on the Freedom of Access laws?

Yes. Beginning July 1, 2008, elected officials must complete a course of training on the requirements of the Freedom of Access laws.

Which elected officials are required to take Freedom of Access training?

Elected officials required to complete the training include:

- the Governor
- Attorney General, Secretary of State, Treasurer of State and State Auditor
- Legislators elected after November 1, 2008
- Commissioners, treasurers, district attorneys, registers of deeds, registers of probate and budget committee members of any county
- Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments
- Officials of school units and school boards
- Officials of regional or other political subdivisions, including officials of water districts, sanitary districts, hospital districts, transit districts or regional transportation districts.

What does the training include?

At a minimum, the training must be designed to be completed in less than 2 hours and include instruction in:

- the general legal requirements regarding public records and public proceedings
- the procedures and requirements regarding complying with a request for a public record
- the penalties and other consequences for failure to comply with the law

Elected officials can meet the training requirement by conducting a thorough review of the material in this FAQ section of the State's Freedom of Access website or by completing another training course that includes all of this information but may include additional information.

FAQ suggested updates 10-21-11

Do training courses need to be certified by the Right to Know Advisory Committee?

No. Training courses do not need the approval of the Right to Know Advisory Committee, or any other State agency.

How do elected officials certify they have completed the training?

After completing the training, elected officials are required to make a written or electronic record attesting that the training has been completed. The record, which will be available to the public, must be kept by the elected official or filed with the public entity to which the official was elected. A [sample training completion form is available](#) (This file requires the free [Adobe Reader](#)).

PUBLIC RECORDS

What is a public record?

The Freedom of Access Act defines "public record" as "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business". A number of exceptions are specified. (See the discussion of exemptions below) [1 M.R.S.A. § 402 \(3\)](#).

Do I have to be a citizen of this state to submit a Freedom of Access Act request for a public record?

No. The Freedom of Access Act provides that "every person" has the right to inspect and copy public records. [1 M.R.S.A. § 408 \(1\)](#).

How do I make a Freedom of Access Act request for a public record?

See the [How to Make a Request page on this site](#).

Is there a form that must be used to make a Freedom of Access Act request?

No. There are no required forms.

Does my Freedom of Access Act request have to be in writing?

No. The Freedom of Access Act does not require that requests for public records be in writing. However, most bodies and agencies ask individuals to

FAQ suggested updates 10-21-11

submit requests in writing in order to maintain a record of when the request was received and what records were specifically requested.

What should I say in my request?

In order for the body, agency or official to promptly respond to your request, you should be as specific as possible when describing the records you are seeking. If a particular document is required, it should be identified precisely—preferably by author, date and title. However, a request does not have to be that specific. If you cannot identify a specific record, you should clearly explain the type of records you are seeking, from what timeframe and what subject the records should contain. For example, assume you want to obtain a list of active landfills near your home. A request to the state Department of Environmental Protection asking for “all records on landfills” is very broad and would likely produce volumes of records. The fees for such a request would be very high; the agency would likely find your request too vague and ask that you make it more specific. On the other hand, a request for “all records identifying landfills within 20 miles of 147 Main Street in Augusta” is very specific and the request might fail to produce the information you desire because the agency has no record containing data organized in that exact fashion. You might instead consider requesting any record that identifies “all active landfills in Augusta” or “all active landfills in Kennebec County.” It is more likely that a record exists which contains this information. You might also want to explain to the agency exactly what information you hope to learn from the record. In other words, if you are really trying to determine whether any active landfills near your home in Augusta accept only wood waste, this additional explanation may help the agency narrow its search and find a record that meets the exact request.

Does an agency have to acknowledge receipt of my request?

Yes. An agency or official must acknowledge receipt of a request within a reasonable period of time. 1 MRSA § 408 (1).

Can an agency ask me for clarification concerning my request?

Yes. An agency or official may request clarification concerning which public record or public records are being requested. 1 MRSA §408 (1).

When does the agency or official have to make the records available?

The records must be made available “within a reasonable period of time” after the request was made. 1 M.R.S.A. § 408 (1). The agency or official can schedule the time for your inspection, translation and copying of the records during the regular business hours of the agency or official, and at a time that will not delay or inconvenience the regular activities of the agency or official. 1 M.R.S.A. §§ 408 (1) & (2).

FAQ suggested updates 10-21-11

Does an agency have to produce records within 5 days of my request?

No. The records that are responsive to a request must be made available "within a reasonable period of time" after the request was made. 1 MRSA § 408 (1). Agencies must respond in writing within 5 working days only if your request is denied in whole or in part. 1 MRSA § 409 (1).

Do I have to go to the agency to inspect the records or can I ask the agency or official to mail me the records?

The Freedom of Access Act only requires the agency or official to make the records available to you for inspection and copying, it does not require the agency or official to mail records. However, depending on the volume of records produced in response to your request, some agencies or officials may be willing to mail copies to you. The agency may charge a reasonable fee to cover the cost of making the copies for you. 1 M.R.S.A. § 408 (1) & (3)(A).

When may a governmental body refuse to release the records I request?

The Freedom of Access Act provides that certain categories of documents are not public records. Included among these are records that have been designated confidential by statute, documents subject to a recognized legal privilege such as the attorney-client privilege or the work-product privilege, records describing security plans or procedures designed to prevent acts of terrorism, medical records, juvenile records, and the personal contact information of public employees contained within records. 1 M.R.S.A. § 402 (3)(A)-(O).

For a list of records or categories of records deemed by statute to be confidential or otherwise not a public record, see the Statutory Exceptions List. While this listing may not be totally complete, it contains the vast majority of exceptions to the Freedom of Access Act.

What happens if a public record holds some information that is open to the public and some information that falls within an exception to the Freedom of Access Act?

Some public records contain a mixture of information that is public and information that is confidential or otherwise not subject to public inspection under the Freedom of Access Act. If the record you requested contains any confidential or excepted information, the custodian will decide if the confidential or excepted information can be adequately redacted or blacked out so that public access can be provided or if public access to the document should be denied.

Does an agency have to explain why it denies access to a public record?

FAQ suggested updates 10-21-11

Yes. When an agency denies access to a public record, it must provide the reason for its denial in writing within 5 working days of the date of the Freedom of Access Act request. 1 M.R.S.A. § 409 (1).

What can I do if I believe an agency has unlawfully withheld a public record?

If you are unsatisfied with an agency's decision to withhold access to certain records, you are entitled to appeal, within 5 working days of your receipt of the written notice of denial, to any Superior Court within the state. 1 M.R.S.A. § 409 (1). Superior Courts Directory: http://www.courts.state.me.us/maine_courts/superior/directory.shtml

May a governmental body ask me why I want a certain record?

The Freedom of Access Act does not specifically prohibit agencies or officials from asking why an individual is requesting a public record. However, if asked, the individual is not required to provide a reason for seeking a record, and the agency cannot deny an individual's request based solely on either the individual's refusal to provide a reason or the reason itself. An agency or official may request clarification concerning which public record or public records are being requested. 1 M.R.S.A. § 408 (1).

Can I ask that public reports or other documents be created, summarized or put in a particular format for me?

No. A public officer or agency is not required to prepare reports, summaries, or compilations not in existence on the date of your request.

Similarly, a public officer or agency is not required to produce a record in an alternate format if the record can be made available for public inspection and copying in the format in which it exists. If the record requires translation in order for it to be made available for public inspection and copying, the agency or official must translate the record but can charge you a fee to cover the actual cost of translation. 1 M.R.S.A. § 408 (3)(C).

I asked a public official a question about a record, but he/she didn't answer. Is he/she required to answer my question?

No. A public officer or agency is not required under the Freedom of Access Act to explain or answer questions about public records. The Act only requires officials and agencies to make public records available for inspection and copying.

What records must a public officer or agency keep, and how long do they have to keep them?

The Generally, the Freedom of Access law does not control what records must be retained or for how long they must be retained. Public officers and

FAQ suggested updates 10-21-11

agencies are required to keep all records made or received or maintained by that officer or agency in accordance with other law or rule. 5 MRSA § 92-A (5) (This file requires the free [Adobe Reader](#)).

However, the Freedom of Access law does require that a public body keep a summary of its public proceedings. The summary must include: the date, time and place of the proceeding; the members of the public body, recorded as either present or absent; and all motions and votes taken, by individual member if the vote is by roll call. The summary can be in any medium, including audio, video and electronic. This requirement applies to public bodies that do more than serve in an advisory capacity. 1 MRSA §403 (2)

How long records must be kept depends on the type of record and the value of the record's content. The [Maine State Archives](#) works with state and local governments to establish rules for the retention and disposition of government records, including the length of time that certain records need to be preserved by the agency before they are either destroyed or sent to the Maine State Archives for long-term or permanent retention.

Are an agency's or official's e-mails public records?

Any record, regardless of the form in which it is maintained by an agency or official, can be a public record. As with any record, if the e-mail is "in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business" and is not deemed confidential or excepted from the Freedom of Access Act, it constitutes a "public record". 1 M.R.S.A. § 402 (3).

Can an agency charge for public records?

There is no initial fee for submitting a Freedom of Access Act request and agencies cannot charge an individual to inspect records. 1 M.R.S.A. § 408 (3)(D). However, agencies can and normally do charge for copying records. Although the Freedom of Access Act does not set standard copying rates, it permits agencies to charge "a reasonable fee to cover the cost of copying". 1 M.R.S.A. § 408 (3)(A).

Agencies and officials may also charge fees for the time spent searching for, retrieving, compiling or redacting confidential information from the requested records. The Act authorizes agencies or officials to charge \$10 per hour after the first hour of staff time per request. 1 M.R.S.A. § 408 (3)(B). Where translation of a record is necessary, the agency or official may also charge a fee to cover the actual cost of translation. 1 M.R.S.A. § 408 (3)(C).

FAQ suggested updates 10-21-11

The agency or official must prepare an estimate of the time and cost required to complete a request and if the estimate is greater than \$20, the agency or official must notify the requester before proceeding. The agency may request payment of the costs in advance if the estimated cost exceeds \$100 or if the requester has previously failed to pay a fee properly assessed under the Freedom of Access Act. 1 M.R.S.A. § 408 (4) & (5).

I cannot afford to pay the fees charged by the agency or official to research my request or copy the records. Can I get a waiver?

The agency or official may, but is not required to, waive part or all of the total fee if the requester is indigent, or if release of the public record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. 1 M.R.S.A. § 408 (6)

Is a public agency or official required under the Freedom of Access Act to honor a "standing request" for information, such as a request that certain reports be sent to me automatically each month?

No. A public body is required to make available for inspection and copying (subject to any applicable exemptions) only those public records that exist on the date of the request. Persons seeking to inspect or obtain copies of public records on a continuing basis are required to make a new request for any additional records sought after the date of the original request.

PUBLIC PROCEEDINGS

What is a public proceeding?

The term "public proceeding" means "the transactions of any functions affecting any or all citizens of the State" by the Maine Legislature and its committees and subcommittees; any board or commission of a state agency or authority including the University of Maine and the Maine Community College System; any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision; the full membership meetings of any association, the membership of which is comprised exclusively of counties, municipalities, school districts, other political or administrative subdivisions, or their boards, commissions, agencies or authorities; and any advisory organization established, authorized or organized by law, resolve or executive order. 1 M.R.S.A. § 402.

What does the law require with regard to public proceedings?

The Freedom of Access Act requires all public proceedings to be open to the public and any person must be permitted to attend. 1 M.R.S.A. § 403.

FAQ suggested updates 10-21-11

When does a meeting or gathering of members of a public body or agency require public notice?

Public notice is required of all public proceedings if the proceedings are a meeting of a body or agency consisting of 3 or more persons. 1 MRSA § 406.

What kind of notice of public proceedings does the Freedom of Access Act require?

Public notice must be given in ample time to allow public attendance and must be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency. 1 M.R.S.A. § 406.

Can a public body or agency hold an emergency meeting?

Yes. Public notice of an emergency meeting must be provided to local representatives of the media, whenever practicable. The notice must include the time and location of the meeting and be provided by the same (or faster) means used to notify the members of the public body or agency conducting the public proceeding. 1 MRSA § 406. The requirements that the meeting be open to the public, that any person be permitted to attend and that records or minutes of the meeting be made and open for public inspection still apply. 1 MRSA § 403.

Can public bodies or agencies hold a closed meeting?

Yes. Public bodies or agencies are permitted, subject to certain procedural conditions, to hold closed "executive sessions" on specified subjects after a public recorded vote of 3/5 of the members present and voting. 1 M.R.S.A. § 405 (1)-(5).

Can the body or agency conduct all of its business during an executive session?

Generally, no. The content of deliberations during executive sessions is restricted to the matters listed in the Freedom of Access Act, such as: discussions regarding the suspension or expulsion of a student; certain employment actions; the acquisition, use or disposition of public property; consultations between a body and its attorney concerning its legal rights and responsibilities or pending litigation; and discussion of documents that are confidential by statute. In addition, any body or agency subject to the Freedom of Access Act is prohibited from giving final approval to any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session. 1 M.R.S.A. § 405 (2) & (6).

What if I believe a public body or agency conducted improper business during an executive session?

Upon learning of any such action, any person may appeal to any Superior Court in the State. If the court determines the body or agency acted illegally,

FAQ suggested updates 10-21-11

the action that was taken by the body or agency will be declared to be null and void and the officials responsible will be subject to the penalties provided in the Act. 1 M.R.S.A. § 409 (2). Superior Courts Directory: http://www.courts.state.me.us/maine_courts/superior/directory.shtml

Can members of a body communicate with one another by email outside of a public proceeding?

~~There is no legal prohibition against email communication between members of a public body outside of a public proceeding.~~

The law does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes of the Freedom of Access law. 1 MRSA § 401.

~~However, email~~ Email or other communication among a quorum of the members of a body that is used as a substitute for deliberations or decisions which should properly take place at a public meeting may likely be considered a "meeting" in violation of the statutory requirements for open meetings and public notice. "Public proceedings" are defined in part as "the transactions of any functions affecting any or all citizens of the State..." 1 MRSA § 402. The underlying purpose of the Freedom of Access law is that public proceedings be conducted openly and that deliberations and actions be taken openly; clandestine meetings should not be used to defeat the purpose of the law. 1 MRSA § 401. Public proceedings must be conducted in public and any person must be permitted to attend and observe the body's proceeding although executive sessions are permitted under certain circumstances. 1 MRSA § 403. In addition, public notice must be given for a public proceeding if the proceeding is a meeting of a body or agency consisting of 3 or more persons. 1 MRSA § 406.

Members of a body should refrain from the use of email as a substitute for deliberating or deciding substantive matters properly confined to public proceedings. Email is permissible to communicate with other members about non-substantive matters such as scheduling meetings, developing agendas and disseminating information and reports.

Email is a public record (likely even when sent using a member's personal computer) if it contains information relating to the transaction of public or governmental business unless the information is designated as confidential or excepted from the definition of a public record. 1 MRSA § 402, sub-§ 3. As a result, members of a body should be aware that all emails and email attachments relating to the member's participation are likely public records subject to public inspection under the Freedom of Access laws.

Can I record a public proceeding?

FAQ suggested updates 10-21-11

Yes. The Freedom of Access Act allows individuals to make written, taped or filmed records of a public proceeding, or to broadcast the proceedings live, provided the action does not interfere with the orderly conduct of the proceedings. The body or agency holding the proceeding can make reasonable rules or regulations to govern these activities so long as the rules or regulations do not defeat the purpose of the Act. 1 M.R.S.A. § 404.

Do members of the public have a right to speak at public meetings under the Freedom of Access Act?

The Freedom of Access Act does not require that an opportunity for public participation be provided at open meetings, although many public bodies or agencies choose to permit public participation. In those instances, the public body or agency can adopt reasonable rules to ensure meetings are conducted in a fair and orderly manner. For example, the body or agency can set a rule that requires the same amount of time be afforded to each person that wants to speak.

Is the public body or agency required to keep running minutes or a record of a public proceeding?

There is no requirement under the Freedom of Access Act that a public body or agency keep running minutes during all public proceedings. The Act does require, however, that public bodies and agencies keep a written record of every decision that involves the conditional approval or denial of an application, license, certificate or permit, and every decision that involves the dismissal or refusal to renew the contract of any public official, employee or appointee. 1 M.R.S.A. § 407 (1) & (2).

If the public proceeding is an "adjudicatory proceeding" as defined in the Maine Administrative Procedure Act, the agency is required to compile a record that complies with statutory specifications, including a recording in a form susceptible of transcription. 5 M.R.S.A. §§ 8002 (1) and 9059.

Is the agency or body required to make the record or minutes of a public proceeding available to the public?

Yes. Any legally required record or minutes of a public proceeding must be made promptly and shall be open to public inspection. In addition, every agency is required to make a written record of any decision that involves conditional approval or denial of any application, license, certificate or other type of permit and to make those decisions publicly available, 1 M.R.S.A. §§ 403, 407; 5 M.R.S.A. § 9059 (3).

G:\STUDIES 2011\Right to Know Advisory Committee\FAQ - updates 10-13-11.doc (10/21/2011 7:58:00 AM)

